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No. 86-5504

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

GLORIA RODRIGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

DEBORAH WATSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a sentencing court can suspend execution of the mandatory two-to-ten year term of imprisonment required by the Bail Reform Act of 1984 for defendants who commit an offense while on pretrial release.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 794 F.2d 24.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 1986. A petition for rehearing was denied on August 5, 1986 (Pet. App. 13a). The petition for a writ of certiorari was filed on September 17, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The underlying facts, which are not in dispute, are set out in the opinion of the court of appeals (Pet. App. 2a). Petitioner was arrested in New York City on April 3, 1985, for selling cocaine within 1,000 feet of a school to an undercover police officer. She was arraigned and released on a personal recognizance bond. Two weeks later, while still on pretrial release from the cocaine charge, petitioner was again arrested, this time for selling heroin to an undercover police officer.

Petitioner pleaded guilty to both charges. The district court sentenced petitioner to four months' imprisonment and a six-year special parole term on the cocaine charge and to two years' probation on the heroin charge. Because the second offense was committed while petitioner was on pretrial release in connection with the first charge, the district court was required to impose an additional sentence of at least two years' imprisonment under 18 U.S.C. 3147. After imposing the two-year minimum sentence, however, the district court suspended that sentence and placed petitioner on probation for an additional two-year period. The district court concluded that it had the power to suspend the two-year minimum sentence required by 18 U.S.C. 3147, because Section 3147 did not explicitly prohibit the suspension of sentence and the imposition of a term of probation. 1/ The government took an appeal from the sentence, arguing that a sentence imposed under Section 3147 may not be suspended in favor of probation.

2. The court of appeals agreed with the government. It therefore vacated the judgment and commitment order and remanded to the district court for resentencing (Pet. App. 1a-6a). The court of appeals held that the district court had no power to suspend the mandatory term of imprisonment required by 18 U.S.C. 3147. The court found that the express terms and the intent underlying Section 3147 required the imposition of at least the mandatory minimum two-year term of imprisonment (Pet. App. 5a).

1/ 18 U.S.C. 3147 provides, in pertinent part:

> A person convicted of an offense committed while released pursuant to this chapter shall be sentenced, in addition to the sentence prescribed for the offense to --
>
> (1) a term of imprisonment of not less than two years and not more than ten years if the offense is a felony; * * *
>
> A term of imprisonment imposed pursuant to this section shall be consecutive to any other sentence of imprisonment.

The court concluded that "to hold that §3147's imprisonment sanction can be suspended would render the statute devoid of the meaning intended by Congress" (Pet. App. 5a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. Petitioner argues (Pet. 9-15) that Section 3147, when read in conjunction with the Federal Probation Act, 18 U.S.C. 3651, does not foreclose a sentencing court from suspending imposition of sentence and placing a defendant on probation. Because the Probation Act provides generally that a court may suspend execution of sentence and place a defendant on probation, and because Section 3147 does not explicitly say that its two-to-ten year enhancement is not subject to suspension, petitioner contends that the plain meaning of the two statutes supports the district court's interpretation.

We submit that both the language and the purpose of Section 3147 support the court of appeals' construction of the statute. Section 3147 provides that a person convicted of committing a felony while on pretrial release "shall be sentenced to a term of imprisonment of not less than two years * * *." Moreover, Section 3147 is a sentence enhancement provision, requiring that the term of imprisonment be "in addition to the sentence prescribed for the offense [committed while on release.]" The statute also provides that the enhanced term of imprisonment "shall be consecutive to any other sentence of imprisonment." As the court of appeals found (Pet. App. 5a), that language strongly suggests that Congress intended the sentencing provision to require that a defendant receiving an enhanced sentence under Section 3147 serve at least an additional two-year term of imprisonment.

That conclusion is bolstered by the statute's legislative history. Section 3147 was passed as part of the Bail Reform Act of 1984, which represented a congressional response to the burgeoning rate of crime committed by individuals released on bail. 2/ The legislative materials indicate that Congress intended the sentencing provision of Section 3147 to be mandatory. In introducing the predecessor of the bill that was to become the Bail Reform Act of 1984, the bill's sponsor stated that Section 3147 was designed to deter criminal conduct by released individuals by providing for "mandatory prison terms" (127 Cong. Rec. 19107 (July 31, 1981) (remarks of Sen. Thurmond)):

> Section [3147] is a new provision that provides mandatory prison terms to run consecutive to any other sentence of imprisonment for the commission of [an] offense while released pursuant to this chapter).

See also 129 Cong. Rec. S. 390 (daily ed. Jan. 27, 1983) (remarks of Sen. Thurmond).

In addition, the reports of the Senate and House Judiciary Committees stressed that Section 3147 was intended to serve as a deterrent by imposing a mandatory minimum term of imprisonment on individuals who commit additional crimes while on pretrial release (S. Rep. 98-147, 98th Cong., 1st Sess. 61 (1983)):

> Section 3147 is designed to deter those who pose a risk to community safety by committing another offense when released under the provisions of this bill and to punish those who indeed are convicted of another offense. This section enforces the self-evident requirement that any release ordered by the courts include a condition that the defendant not commit another crime committed by those on pretrial release * * *. [T]his requirement needs enforcement. Accordingly, this section prescribes a penalty in addition to any

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2/ See 127 Cong. Rec. 19015, 19020 (July 31, 1981) (remarks of Sens. Thurmond and Kennedy); S. Rep. 98-147, 98th Cong., 1st Sess. 8, 24-30 (1983); H.R. Rep. 98-1121, 98th Cong., 2d Sess. 33, 35 (1984); Hearing on S. 829 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 119-120 (1983).

> sentence ordered for the offense for which the defendant was on release. This additional penalty is a term of imprisonment of at least two years and not more than ten if the offense committed while on release is a felony.

Accord H.R. Rep. 98-1121, 98th Cong., 2d Sess. 30-31, 35 (1984); S. Rep. 98-225, 98th Cong., 1st Sess. 34, 417 (1983); S. Rep. 97-317, 97th Cong., 2d Sess. 64, 70 (1982).

In light of the legislative history, the court of appeals correctly concluded that to hold that Section 3147's imprisonment sanction could be suspended would frustrate Congress's intent. In so holding the court of appeals was not engaging in impermissible judicial "reconstruction" of the statute, as petitioner maintains; rather, the court of appeals was properly attempting to ascertain Congress's intent and to give effect to its will. See, e.g., United States v. General Motors Corporation, 518 F.2d 420, 438 (D.C. Cir. 1975) ("[I]t is 'our duty to favor an interpretation which would render the statutory design effective in terms of the policies behind its enactment and to avoid an interpretation which would make such policies more difficult of fulfillment, particularly where, as here, that interpretation is consistent with the plain language of the statute'").

To be sure, as petitioner points out (Pet. 11), the courts have held that a provision in another statute, 18 U.S.C. 2114, which states that an offender "shall be imprisoned twenty-five years," does not preclude suspension of the sentence. See United States v. Donovan, 242 F.2d 61, 64 (2d Cir. 1957); United States v. Cameron, 351 F.2d 448, 449 (7th Cir. 1965); United States v. Hardaway, 350 F.2d 1021, 1022 (6th Cir. 1963). It is also true that several criminal statutes explicitly provide that their minimum sentences may not be suspended. See, e.g., 18 U.S.C. 924(c); 18 U.S.C. 929(A); 21 U.S.C. 848(c); 21 U.S.C. 845A(c). While those two factors, standing alone, might suggest an intention on Congress's part to permit suspension of sentences imposed under Section 3147, those indicators of possible congressional

purpose "must yield to clear contrary evidence of legislative intent." National Railroad Passenger Corp. v. National Association of Railroad Passengers, 414 U.S. 453, 458 (1974). See also Neuberger v. Commissioner, 311 U.S. 83, 88 (1940); United States v. Barnes, 222 U.S. 513, 519 (1912); Campbell v. Wells Fargo Bank, N.A., 781 F.2d 440, 442 (5th Cir. 1986) (the maxim that "where Congress has carefully employed a term in one place but excluded it in another, it should be excluded," is only an aid to statutory construction, not a rule of law, and "can be overcome by a strong indication of contrary congressional intent"). Here, as the court of appeals concluded, the legislative history of the Bail Reform Act demonstrates Congress's intent that the sentence enhancement provision for individuals who commit additional offenses while on pretrial release is mandatory, and may not be suspended.

2. In any event, the question whether sentences under Section 3147 may be suspended is not an issue of continuing importance. Section 3147 has been amended, effective November 1, 1987, to eliminate the minimum mandatory sentence. Pub. L. 98-473, Title II, § 223(g). As of that date, the sentencing guidelines created by the United States Sentencing Commission will govern the proper length of the penalty to be imposed for offenses committed while a person is on pretrial release. Pub. L. 98-743, Title II, § 217(a). The issue presented in this case will then have no effect on sentences imposed under Section 3147.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

DEBORAH WATSON
Attorney

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